

1 Thomas R. Malcolm (State Bar No. 39248)  
trmalcolm@jonesday.com

2 JONES DAY  
3 3 Park Plaza, Suite 1100  
Irvine, California 92614  
4 Telephone: (949) 851-3939  
Facsimile: (949) 553-7539

5 Kevin G. McBride (State Bar No. 195866)  
kgmcbride@jonesday.com

6 Steven J. Corr (State Bar No. 216243)  
sjcorr@jonesday.com

7 JONES DAY  
8 555 S. Flower Street, 50<sup>th</sup> Floor  
Los Angeles, CA 90071  
9 Telephone: (213) 489-3939  
Facsimile: (213) 243-2539

10 Attorneys for Defendant VIZIO, Inc.

11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13

14 SONY CORPORATION,

15 Plaintiff,

16 v.

17 VIZIO, INC.,

18 Defendant.  
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Case No. CV-08-01135-RGK(FMOx)

**VIZIO'S REPLY IN SUPPORT OF  
ITS MOTION TO FILE ITS  
PROPOSED AMENDED ANSWER,  
AFFIRMATIVE DEFENSES AND  
COUNTERCLAIMS TO SONY'S  
AMENDED COMPLAINT**

Date: May 18, 2009  
Time: 9:00 a.m.  
Judge: Hon. R. Gary Klausner  
Courtroom: 850

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## INTRODUCTION

Sony's Opposition to Vizio's motion is premised on the erroneous notion that the Federal Rules and case law do not permit Vizio to amend its Answer to assert "new causes of action" as counterclaims. As demonstrated, this outmoded view is not the general rule, and the facts and law strongly show that Vizio's motion to amend should be granted.<sup>1</sup>

Vizio's proposed amendment will allow the parties to resolve the entire controversy between them, resulting in substantial savings in cost, effort and judicial resources. In meetings between Vizio and Sony, the parties have sought to resolve the current controversy by means of an agreement to cross-license certain of their patents relating to digital televisions. (Wamsley Decl. ¶ 2.) In recent conversations, Vizio communicated its desire to exclude from the potential cross-license certain Vizio patents relating to standards – just as Sony had excluded certain Sony patents from the deal. (*Id.* at ¶ 3.) Sony, however, refused to agree, insisting that any resolution of the dispute concerning the Sony patents must include a cross-license under all of the Vizio patents. Thus, it is clear, that the patent dispute between Sony and Vizio cannot be fully and effectively resolved without the Vizio patents being joined in the action. Sony has not shown that the addition of these infringement counterclaims will unduly prejudice Sony. Accordingly, Vizio's motion to amend should be granted.

## ARGUMENT

### **A. Sony Has Not Met Its Burden in Opposing Vizio's Motion**

Federal Rule of Civil Procedure 13(b) states that a "pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ.

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<sup>1</sup> As its Opposition makes clear, Sony does not oppose Vizio's motion to add counterclaims for declaratory judgments of noninfringement and invalidity of two of their patents against Sony Corporation.

1 P. § 13(b). Furthermore, a “claim which either matured or was acquired by the  
2 pleader after serving a pleading may, with the permission of the court, be presented  
3 as a counterclaim by supplemental pleading.” Fed. R. Civ. P. § 13(e). The  
4 Supreme Court has held that the filing of such permissive counterclaims furthers  
5 judicial economy as it allows all claims between parties to be resolved in one  
6 proceeding. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974).

7 Contrary to Sony’s claim,<sup>2</sup> “courts have ruled that a supplemental pleading  
8 may include a new ‘cause of action’ when it would be convenient to litigate all the  
9 claims between the parties in the same action.” 6A Wright, *et al.*, FEDERAL  
10 PRACTICE AND PROCEDURE: CIVIL 2D §1506 (2009). Indeed, the Ninth Circuit  
11 emphasized in *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988), that the allowance  
12 of such supplemental claims is avored:

13 [Rule 15(d)] is a tool of judicial economy and convenience. Its use is  
14 therefore favored.... It is a useful device, enabling a court to award  
15 complete relief, or more nearly complete relief, in one action, and to  
16 avoid the cost, delay and waste of separate actions which must be  
17 separately tried and prosecuted. So useful they are and of such service  
18 in the efficient administration of justice that they ought to be allowed  
19 as of course, unless some particular reason for disallowing them  
20 appears, though the court has the unquestioned right to impose terms  
21 upon their allowance when fairness appears to require them.

22 Relying on this principle, courts have long routinely granted parties leave to

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23 <sup>2</sup>Sony’s reliance on *Planned Parenthood of Southern Arizona v. Neely*, 130 F.3d  
24 400 (9th Cir. 1997), and *U.S. ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1073 (9th  
25 Cir. 1989) is misplaced. In *Planned Parenthood*, the parties had reached a final  
26 resolution of the case four years prior to plaintiffs’ request to supplement their  
27 complaint and the district court had not retained jurisdiction. *Id.* at 402-403. The  
28 issue in *Wulff* was whether a supplemental pleading could relate back to the original  
pleading to avoid a time bar, not whether an amendment of the pleading was  
proper. *Id.* at 1073-74.

1 file supplemental counterclaims or pleadings asserting additional patents acquired  
2 after-the-fact. *See, e.g., General Motors Corp. v. Kolodin*, 16 F.R.D. 20, (E.D.N.Y.  
3 1954) (granting defendant leave to amend to assert counterclaim for infringement of  
4 a patent acquired after he had answered); *Vernay Labs. v. Indus. Elec. Rubber Co.*,  
5 234 F.Supp. 161, 166-67 (N.D. Ohio 1964) (observing that “motions for  
6 supplemental complaints in patent cases have been treated liberally” and ruling that  
7 “[t]he entire patent controversy between the parties should be settled at one trial.”);  
8 *Micron Tech. Inc. v. Rambus, Inc.*, 409 F.Supp.2d 552, 558 (D. Del. 2006) and  
9 *IXYS Corp. v. Advanced Power Tech., Inc.*, No. C 02-03942, 2004 WL 135861, \*5  
10 (N.D. Cal. Jan. 22, 2004) (both cases allowing defendant to amend counterclaims to  
11 assert infringement of own patents).

12 The main case Sony relies upon, *Matsushita Elec. Indus. Co. v. CMC*  
13 *Magnetics Corp.*,<sup>3</sup> is not on point. In *Matsushita*, the defendant sought to add  
14 counterclaims of patent infringement for a patent covering “an entirely different  
15 product” than the ones at issue which, the parties agreed, would have required  
16 “bifurcation of the counterclaim entirely if [it] were allowed to go forward.” *Id.* at  
17 \*3-4. Here, no bifurcation of Vizio’s proposed counterclaims will be required  
18 because discovery is still in its early stages. (Wamsley Decl. ¶ 11.) Vizio’s  
19 counterclaims seek to assert its patents against Sony’s televisions just as Sony’s  
20 patents are asserted against Vizio’s televisions. Also, both the Vizio and Sony  
21 patents cover technology involving the decoding of digital video data for display.  
22 (*Id.* at ¶ 10.) Sony asserts that the Vizio patents disclose tuner technology (Sony  
23 Br. at 7) but neglects to mention that one of the asserted Sony patents, U.S. Pat. No.  
24 6,661,472, entitled “Channel Selection in Digital Television,” also claims “a tuner”  
25 to “tune to a physical channel to supply a signal carried on the physical channel to a  
26 display.” (Wamsley Decl. ¶ 10.) Unlike in the *Matsushita* case where there was no  
27 overlap between the technology or products at issue, Vizio’s proposed patent

28 <sup>3</sup> No. C06-04538 WHA, 2007 WL 127997 (N.D. Cal. Jan. 12, 2007)

1 counterclaims cover overlapping products and technology. Moreover, while the  
2 patents at issue in the *Matsushita* case were found to have been purchased so that  
3 the defendant could assert them as counterclaims, that is not the case here. In fact,  
4 Vizio originally sought to get Sony's agreement to exclude the patents from the  
5 controversy and only moved to amend when Sony refused to agree to that. (*Id.* at  
6 ¶ 2-4.)

7 Contrary to Sony's assertion, "[t]he legal standard for granting or denying a  
8 motion to supplement under Rule 15(d) is the same as for amending under Rule  
9 15(a)."<sup>4</sup> *Paralyzed Veterans of America v. McPherson*, 2008 U.S. Dist. LEXIS  
10 69542, \*81 (E.D. Cal) (*citing Glatt v. Chicago Park District*, 87 F.3d 190, 194 (7th  
11 Cir. 1996), *Lewis v. Knutson*, 699 F.2d 230, 239 (5th Cir. 1983) and 6A Wright, *et*  
12 *al.*, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §1504, at 185-86 (2d ed. 1990)).  
13 Therefore, Sony has the burden of showing "bad faith, undue delay, prejudice to the  
14 opposing party, and futility of the amendment." *DCD Programs, Ltd. v. Leighton*,  
15 833 F. 2d 183, 186 (9th Cir. 1987). Because Sony has failed to meet its burden,  
16 Vizio's motion to amend should be granted.

17 **1. Sony does not assert Vizio's counterclaims are futile**

18 Vizio's proposed patent infringement counterclaims are not futile for the  
19 reasons set forth in Vizio's opening brief and Sony does not contend otherwise.  
20 (Vizio Br. at 5, Sony Opp'n Br. at 1.)

21 **2. There has been no undue delay**

22 Sony concedes that Vizio could not have brought its infringement

23 Sony concedes that Vizio could not have brought its infringement  
24 <sup>4</sup> Moreover, "Courts "generally have adhered to the liberal amendment policy of  
25 Rule 15" in deciding whether to add omitted counterclaims "***regardless of whether***  
26 ***it is termed a supplemental or amended pleading.***" See *SAES Getters v. Aeronex,*  
27 *Inc.*, 219 F.Supp.2d 1081, 1095 n.11 (S.D. Cal. 2002) (emphasis added) (refusing to  
28 deny defendant's motion to amend its answer to add a patent infringement  
counterclaim where plaintiff argued that the motion should have been filed under  
Rule 13(f) rather than Rule 15(a)).



1 counterclaims at the time it filed its original answer because Vizio did not acquire  
2 the patents until later.<sup>5</sup> (Sony Opp'n at 1.) Therefore, there has been no undue  
3 delay.<sup>6</sup>

### 4                   **3.     Vizio has not acted in bad faith**

5               Sony's contention that Vizio acted in bad faith is totally without merit. The  
6 sole basis Sony provides for its assertion is that Vizio's motion violates a purported  
7 standstill agreement reached between the parties on April 14. (Sony Opp'n Br. at  
8 9.) Although such an agreement was discussed, it was never finalized. (Wamsley  
9 Decl. ¶¶ 4-7.) Vizio's counsel requested a meeting, which Sony's counsel refused.  
10 (*Id.*) Sony's argument further disregards the fact that, later the same day that Sony  
11 contends an agreement was reached, Vizio contacted Sony to inform it of its  
12 intention to seek leave to amend its answer in order to comply with the Court's  
13 deadline for amending pleadings. (*Id.*) Moreover, Sony does not allege any  
14 prejudice from these alleged events or that it acted in any way to its detriment in  
15 reliance on the nonexistent agreement.

16               In sharp contrast to Sony's claims, bad faith on the part of a party seeking  
17 amendment has been found in cases of egregious conduct not found here – such as,  
18 for example, where a party seeks to amend a pleading with knowing  
19 misrepresentations of law or fact, *Griggs v. Pace Am. Group Inc.*, 170 F.3d 877,  
20

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21               <sup>5</sup> Sony erroneously argues that Vizio's motion to amend its answer was untimely.  
22 (Sony Opp'n Br. at n.4.) Vizio filed its motion to amend within the required  
23 deadline, on April 21, with its supporting papers. These papers were never stricken.  
24 (Doc. Nos. 49-53.) The Court only struck the separate electronic copy of the  
25 proposed answer (not the copy attached as an exhibit to the motion), and requested  
that it be filed by hand, which Vizio did on April 23. (*Id.*) This does not constitute  
undue delay.

26               <sup>6</sup> "In evaluating undue delay, [the Ninth Circuit] also inquire[s] 'whether the  
27 moving party knew or should have known the facts and theories raised by the  
28 amendment in the original pleading.'" *AmerisourceBergen Corp. v. Dialysist West,*  
*Inc.*, 465 F.3d 949, 953 (9th Cir. 2006).

1 880-881 (9th Cir. 1999), or to add additional parties in order to disrupt jurisdiction,  
2 *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987). Sony's opposition  
3 brief does not allege any action that rises to the level of bad faith.

4 **4. The addition of Vizio's patent infringement counterclaims**  
5 **will not unduly prejudice Sony**

6 Sony asserts that Vizio should not be allowed to add its patent infringement  
7 counterclaims because doing so would "inject an additional layer of complexity and  
8 delay" into the action. (Sony Opp'n Br. at 8.) This is not the test for determining  
9 whether permissive counterclaims should be added because counterclaims, by  
10 definition, nearly always add some level of complexity to a case.<sup>7</sup> Rather, Sony  
11 must show that the addition of Vizio's counterclaims would result in undue  
12 prejudice to Sony. *See DCD Programs, Ltd.*, 833 F. 2d at 186.

13 As previously discussed, the Vizio patents concern technology similar to that  
14 already at issue in the litigation. (Wamsley Decl. ¶ 10.) Furthermore, Vizio and  
15 Sony have been meeting for many months in an attempt to reach a broad cross-  
16 licensing agreement relating to digital televisions. (*Id.* at ¶ 2.) In recent attempts to  
17 settle this case, Vizio repeatedly requested that Sony agree to exclude the Vizio  
18 patents from the potential cross-license, since Sony was insisting on a similar  
19 provision. Sony has refused. (*Id.*) Because Sony is insisting that the controversy  
20 between the parties can only be resolved by an agreement that gives Sony a cross-  
21 license to the Vizio patents, fundamental fairness suggests that the Vizio patents  
22 should be addressed in the same proceeding and at the same time as the Sony  
23 patents.<sup>8</sup>

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24 <sup>7</sup> *Micron Tech., Inc. v. Rambus, Inc.*, 409 F.Supp.2d 552, 559 (D.Del. 2006)  
25 (allowing defendant's supplemental infringement counterclaim stating "it may be  
26 necessary to address case complexity in determining how to try the case, but that is  
not a basis for denying leave to amend").

27 <sup>8</sup> *General Motors Corp. v. Kolodin*, 16 F.R.D. 20, 22 (E.D. N.Y. 1954)  
28 (granting defendant's motion to supplement its answer under Rule 13(e) to add a  
patent infringement counterclaim because the rules "should be liberally construed

1           Moreover, the fact that Sony may sustain additional discovery costs does not  
2           constitute undue prejudice. *See Gilman v. Davis*, No. CIV. S-05-830, 2009 US.  
3           Dist. LEXIS 21609, \*11-14 (E.D. Cal. March 4, 2009) (defending a lawsuit  
4           necessarily involves significant costs, including discovery costs, which are not  
5           themselves prejudicial). Any resulting prejudice to Sony will be small because  
6           Sony will have to defend Vizio's infringement claims somewhere. As part of that  
7           effort, Sony will be required to retain experts and engage in third party discovery.  
8           It is much more efficient to consolidate the discovery for all of the patent claims  
9           between the parties.

10           Contrary to Sony's assertions, fact discovery is still in its early stages. No  
11           depositions have been taken, no protective order has been entered, and the parties  
12           have only recently served responses to the first round of discovery requests.  
13           (Wamsley Decl. ¶ 11.) Sony's proclamation that it has produced "tens of thousands  
14           of pages" is misleading because it fails to mention that those documents consist  
15           largely of Vizio's own publicly-available product manuals. (*Id.*) Sony has yet to  
16           produce any of its own documents other than copies of the patents and their file  
17           histories. Third party confidential documents have yet to be produced. (*Id.*)

18           Nearly six months remain before the deadline for fact discovery. (Doc. No.  
19           47 (setting November 1, 2009 as the discovery cut-off date)). The current schedule  
20           will have provided Vizio with approximately ten months of preparation in defense  
21           of Sony's ten asserted patents. Vizio seeks leave to add counterclaims for only four  
22           patents. Therefore, six months of fact discovery should be sufficient and Vizio's

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 (continued...)

25           to avoid a multiplicity of suits [and] [n]o useful purpose would be served in  
26           relegating the defendant to an independent suit against the plaintiff"); 6A Wright, *et*  
27           *al.*, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §1506 (2009) ("a party should  
28           be given every opportunity to join all of his grievances against another party  
          regardless of when they arose. More in keeping with this philosophy are those  
          decisions that have allowed the joinder of new claims by supplemental pleading.").

Vizio's Reply in Supp. of its Mot. to File Prop.  
Amend. Answer, Aff. Def. & Counterclaims  
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1 proposed counterclaims should not result in a substantial delay that unduly  
2 prejudices Sony.

3 Even if the schedule were extended to provide Sony with a full ten months of  
4 fact discovery for Vizio's four patents, Sony has failed to meet its burden of  
5 showing that such a minor four month delay will result in undue prejudice. The  
6 *Agar Corp. v. Multi-Fluids, Inc.*,<sup>9</sup> case Sony cites to support its argument is  
7 inapposite. In that case, the Court denied defendants' motion because they did not  
8 seek leave to amend their answer to add counterclaims until "over nine months after  
9 the period for amending the pleadings had expired, over a month after the deadline  
10 for designating experts had passed, and over twenty-seven months after the suit was  
11 filed."). In contrast, Vizio filed its motion to amend within the time limit ordered  
12 by this Court. Because Sony has failed to meet its burden of showing that it will  
13 suffer undue prejudice from the addition of Vizio's patent infringement  
14 counterclaims, Vizio's motion to amend its answer should be granted.

15 **B. Vizio Has Complied With Local Rule 7-3**

16 Sony argues that Vizio's motion should be denied for failure to comply with  
17 Local Rule 7-3. Although the parties discussed the motion, Sony complains that  
18 Vizio did not disclose that it would name two related Sony entities as counter-  
19 defendants. But Vizio informed Sony at the conference of its intention to add the  
20 patent counterclaims based on its belief that Sony's products infringe several of  
21 Vizio's patents. (Wamsley Decl. ¶ 6.) Because Sony itself knew full well which  
22 Sony entities would be liable for the various acts of infringement, Sony Corporation  
23 cannot claim surprise that Vizio's counterclaims seek to include those entities.  
24 Vizio's filed its motion to amend within the Court's deadline for filing for amended  
25 pleadings and joining parties. (April 6, 2009 Order.) Furthermore, the other two  
26 Sony entities are no strangers to the present controversy as representatives of all  
27

28 <sup>9</sup> No. H-95-5105, 1998 WL 425474, at \*4 (S.D. Tex. April 17, 1998).

1 three Sony companies and Vizio have been participating in the meetings regarding  
2 a possible cross-licensing agreement. (Wamsley Decl. ¶ 2.) Moreover, Sony offers  
3 no reason that a disclosure of the particular counter-defendants would have been  
4 important to or changed the outcome of the discussion. Vizio's good faith  
5 discussion of its intention to add the patent infringement counterclaims against  
6 Sony's products satisfied its burden under Local Rule 7-3.<sup>10</sup>

7 Sony also complains that Vizio violated Rule 7-3 by refusing to provide the  
8 patent number for each patent it intended to assert against Sony. In fact, Vizio  
9 offered to identify the patents if Sony agreed not to file a declaratory judgment  
10 action before Vizio's motion could be heard.<sup>11</sup> (Wamsley Decl. ¶ 7.) Yet, Sony  
11 flatly refused. (*Id.*) Thus, Sony cannot credibly complain that Vizio was  
12 unreasonable in not disclosing the patents. Moreover, Local Rule 7-3 does not  
13 require a particular level of disclosure but requires a discussion of "the substance of  
14 the contemplated motion and any proposed resolution." That was done. If Sony  
15 needed more information, it should have worked with Vizio to resolve Vizio's  
16 declaratory judgment concern. Under the circumstances, the level of disclosure by  
17 Vizio was appropriate under Local Rule 7-3.

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24 <sup>10</sup> See *Del Amo v. Baccash*, No. CV07-663-PSG, 2008 WL 4414514, \*2 (C.D.  
25 Cal. Sept. 16, 2008) (finding defendants' "failure to meet and confer on every  
26 substantive issue" did not preclude their motion where "there was no evidence of  
bad faith").

27 <sup>11</sup> Vizio's concern was justified as Sony rushed to file a declaratory judgment  
28 action in the N.D. of California after AmTRAN disclosed its patents to Sony during  
licensing negotiations between Sony, AmTRAN and Vizio. (Wamsley Decl. ¶ 8.)

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**CONCLUSION**

For the foregoing reasons, Vizio respectfully requests this Court grant Vizio's motion for leave to file its proposed Amended Answer, Affirmative Defenses and Counterclaims to Sony's Amended Complaint.

Dated: May 11, 2009

Respectfully submitted,

JONES DAY

By: Lena Bacani  
Lena Bacani

Attorneys for Defendant VIZIO, INC.

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kevinjohnson@quinnemanuel.com

21  
22  
23

stevenanderson@quinnemanuel.com  
rorymiller@quinnemanuel.com

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1 at whose direction the service was made.

2 Executed on May 11, 2009, at Los Angeles, California.

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5 Linnea Kempf  
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